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No. 90-1173

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PUBLIC SERVICE COMPANY OF COLORADO
and R. M. RICHARDS,

Petitioners,

v.

WILLARD A. THOMPSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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The respondent, Willard A. Thompson, respectfully prays that the Petition for a Writ of Certiorari filed herein by petitioner, Public Service Company of Colorado and R. M. Richards, to review the judgment and opinion of the Supreme Court of Colorado entered in this proceeding on October 22, 1990, be denied.

STATEMENT OF THE CASE

It is crucial to direct the Court's attention to the failure of the petitioners to put the entire collective bargaining agreement into evidence. The Colorado Court of Appeals pointed out that there is no evidence that the agreement required a written notification of disciplinary action. It went on to say that the contract did not prohibit it either (25(a) to 26(a). This statement was made with only selected portions of the agreement before it which had been attached to the motion for summary judgment filed in the trial court.

Other references are made in the opinions of the Colorado Court of Appeals and the Colorado Supreme Court. The only designation of the record on appeal was that of the respondent, and he did not designate the collective bargaining agreement since the burden was on the petitioners to expand the record in the trial court if they so chose. In fact, respondent's counsel has never seen a copy of the entire agreement. The Colorado Supreme Court explicitly pointed out that since this action was disposed of by summary judgment, it must reconstruct the factual background from the parties' pleadings, affidavits and depositions. In fact, only limited portions of the two depositions taken in this action, that of respondent and petitioner Richards, were attached to the petitioners' motion for summary judgment. For reasons known only to petitioners the collective bargaining agreement was not presented *in toto* to either of the lower courts, and clearly cannot be presented here. Therefore, the Court is somewhat at a handicap which is not the ideal way to present a case for certiorari consideration.

The failure is being brought to the attention of the Court since petitioners refer to it freely as though the lower courts had considered the precise language provisions of the entire agreement. See petition, p. 4, fn. 2. But, in view of Lingle v. Norge Division of Magic Chef, Inc, 486 U.S. 399 (1988), and petitioners' concession that their case does not depend upon interpretation of the agreement, but upon other theories, this omission may be irrelevant.

The petitioners' statement of the case is wanting since it does not refer to or develop in any manner the intolerable and outrageous set of facts that underlies the respondent's case against them. More details are necessary particularly since the Colorado Supreme Court expresses its disagreement that 29 U.S.C. § 185 (1982), referred to as § 301, supports the recognition of an unqualified privilege under federal law, and also points out that the qualified privilege articulated by the Colorado court was "virtually indistinguishable" from the standard approved by this Court.[1]

Respondent, a former employee of the corporate petitioner (Company) claims that on December 6, 1983, the Company and petitioner Richards, a superintendent of operations for the Company, published, circulated, and acted upon an inter-department memorandum which charged respondent with sexual harassment. The charge was reported to various persons in the Company, and placed in plaintiff's personnel file. It was subsequently published to others outside the Company. Respondent

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1- Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974); Linn v. United Plant Guard Workers Local 114, 383 U.S. 53 (1966).

claims the statements were false and defamatory, and were published maliciously, and with full knowledge of their falsity by Richards, acting for and on behalf of the Company. Damages are claimed under the doctrine of libel per se.

In a second claim for relief, respondent claims that the Company, again through Richards, published, circulated, and acted upon his inter-department memorandum charging respondent with falsification of a time card, which would in effect be theft from the Company by fraud. It was charged the statement was false and defamatory, was published maliciously, and with full knowledge of its falsity. Plaintiff also claims damages charging that the statement was libelous per se.

Petitioners interposed a number of defenses, including qualified privilege. They relied on Abrahamsen v. Mountain States Tele. & Tele., 177 Colo. 422, 494 P.2d 1287 (1972), a leading Colorado case.

After the depositions of respondent and Richards were taken, petitioners filed a motion for summary judgment. With regard to the trial court, only Abrahamsen assumes importance since it relied solely on that case as the basis for its decision that a review of the exhibits and deposition excerpts showed no genuine issues of fact concerning the question of malice. It concluded that the statements made by Richards were not made with actual malice as required by Colorado law in order to overcome the qualified privilege, and granted the motion for summary judgment.

The only evidence in the record are excerpts from two depositions, the affidavit of respondent, various exhibits attached to the

petitioners' motion for summary judgment and the response thereto, Richards' affidavit, and brief affidavits of several of respondent's superiors.

Complementing the complaint, respondent filed a lengthy affidavit in opposition to petitioners' motion for summary judgment which laid out these facts: On November 17, 1983, respondent was an employee of the Company holding a position of operator, and had been employed by the Company for 22 years. On that date he and two fellow employees were sent to the State Steam Plant in Denver. They were to do maintenance work on two boilers in the basement of the building. The other two employees left to pick up a load of salt.

Respondent, with nothing to do until they returned, went upstairs where he noted a bulletin board. He examined it and saw some mention of a Christmas party for the state employees. He became interested because he was an organist and pianist, and played at various functions such as weddings and parties, including Company parties. Sometimes he charged a fee, other times he donated his services.

He made what he called an innocent effort to ascertain the person in charge of the party. He spoke to a Ms. Mattox who appeared to be in charge of the employees on that floor. He noted that no one appeared friendly, and that for some reason she and four other women who were in her immediate vicinity seemed to be up tight about something. Receiving no satisfaction after trying to talk to some of the people, he went back downstairs. He never met or talked with a Mr. Cook who purportedly made some complaint about him to Richards.

Later, a fellow employee came to the building and told respondent that Richards wanted him to return immediately to the Denver plant.

Respondent was escorted to the office of Richards who made no particular charge, but told respondent that everything was going to be all right, that Richards would investigate, and respondent was told to relax. Respondent didn't know what he was talking about. It appeared that he had offended someone by his presence. After the meeting he called Cook and told him that if he had offended anybody, he was apologizing.

Respondent was not advised of the seriousness of the charge being made by Richards until around December 6, 1983, when he was called to Richards' office and handed a letter of Disciplinary Suspension charging respondent with a panopoly of charges including poor work performance, reference to an earlier incident when Richards had complained about improper documentation of lost time, another directive wherein he had charged respondent with negligence and incompetence, and to these charges Richards added "sexual harassment" involving customer employees. No details were given. Respondent was bewildered because he could not believe such a charge could be leveled against him.

The other charges, including that alleged in respondent's second claim for relief involving a time card, were part of an ongoing series of incidents and conduct on the part of Richards which clearly demonstrated to respondent that he had malicious motives with regard to him, and was hoping to get rid of him. Not only did Richards file four unwarranted charges against respondent, but he did other things which the respondent considered vicious and demeaning.

The respondent was 58 years of age at the time, and a veteran employee. Richards was over 20 years younger, and in July, 1983, was appointed supervisor over respondent and others. From the very beginning, it became difficult for him and other older employees to function because of Richards' policies and overbearing attitude. In this instance, he gave respondent no chance to explain even after he handed him a letter with a 5-day suspension. Richards was never clear with regard to what respondent purportedly had done.

As soon as Richards was appointed respondent's supervisor, he gave him and a few other older men jobs which are not usually done by operators, particularly those who are no longer young, such as janitor and cleaning work, painting, crawling into hot steam holes, climbing into tanks through tiny manholes, and working with sand blasters. These jobs were difficult for respondent because of his age, but Richards ordered him to do such work. Respondent stated that Richards made it clear that respondent was in trouble as soon as he became respondent's boss. He told respondent and others that he was starting a new "regime." For example, one day he ordered respondent to sand the floor of his office. As he was sitting in his chair, respondent was working on his knees on the floor near Richards' feet. Richards leaned over and said, "One of these days I'll have enough on you to get rid of you." Respondent described Richards in general as being nasty, arrogant, and spiteful. He never spoke decently to respondent who always feared for his job.

On another occasion Richards told respondent that what had happened to a manager can happen to him. The manager had been

relieved of his duties, "pigeon-holed," and died shortly thereafter. Respondent was more fearful for his job than ever, and he really thought he had lost it when the false charge of sexual harassment was made on top of the other earlier charges.

With regard to the charge of falsifying a time card, this was false and based on the opinion of Richards that one must have a doctor's certificate even if you did not go to a doctor, and were off for only one day. One superior labeled the charge of falsifying a time card as "ridiculous." It was later marked "void" by another superior.

There was publication outside the Company by a writer for the Company newspaper. Publication was made to the editor of a religious newspaper called "Servant" who had called the Company newspaper office making inquiry about writing a laudatory story about the work of respondent and his wife with the Denver homeless and the so-called "street people." The editor was told by the Company newspaper reporter that he would not want to write anything about "this man" because he was up for sexual harassment charges. The reporter for the "Servant" then declined to write the article. There was also a loss of donations by a wealthy Denver philanthropist when the facts of the charges were made known to her and became common knowledge throughout the Company.

All the charges did not go to a grievance procedure except sexual harassment. This charge was later dropped. Respondent retired under an early incentive program although he did not wish to do so. He retired since he was afraid of losing his job because of Richards,

and the defamation action respondent had filed against him.

Respondent also charged that two supervisors were told by Richards to lean on him, and to get something on him and others. Both supervisors, named in respondent's affidavit, one retired and one still employed, advised respondent of this fact, and would be called to testify.

During the course of Richards' deposition, he was asked if he would like to see respondent leave the Company. His answer: "I don't think that would hurt anything." In his affidavit filed with petitioners' motion for summary judgment, he claimed that he had respondent removed from the State Steam Plant as a result of a complaint from Mr. Vic Cook, an employee of the State of Colorado. He stated that he suspended plaintiff for his conduct on November 17, 1983, because as he was told, respondent had been loitering around the state administrative office, had been copying the telephone numbers and names of the state female employees from the desk name plates, had been interrupting the female employees with personal questions concerning their Christmas parties, and has asked for their telephone numbers. Richards charged that this is sexual harassment.

According to Richards, Mr. Cook had said that Mr. Thompson had been loitering upstairs where there was a secretarial pool and had been asking questions and generally bothering the secretarial pool people. However, Mr. Cook did not state what the questions were. He said nothing specific. Cook could not mention anything specific.

He stated again that respondent was just generally in the office and walking around through the desk areas.

No one questioned respondent after he was taken to the Denver Steam Plant.

Before Richards interviewed respondent, he had no further occasion to talk to Mr. Cook, nor did he speak to any of the girls in the secretarial pool. The only knowledge he had was that given to him by Mr. Cook, which he then elaborated upon.

He interviewed the respondent at the steam plant and told him about the telephone conversation. Respondent said that he had been "up there," that he had been asking about playing at a Christmas party, and had been walking around in the secretarial pool talking to various employees. That's all he said. Richards spoke to the other employees who were at the State Plant that day, but they could not provide any information. He went to the State Plant where the bulletin board was located and looked at it because respondent told him he wanted to play for the Christmas party. He considered it unusual that respondent had looked at the bulletin board. He considered that loitering. He did not admit that respondent had nothing to do until his fellow employees returned with the salt.

Richards conceded that he did not talk face to face with Mr. Cook with regard to the incident. He talked to a girl about it, but none of the other girls would talk to him. He had heard that there had been obscene phone calls that had upset these girls. He is not aware of anyone charging respondent with making such calls.

Mr. Cook told Richards that he would forward a letter of

complaint from the female employees outlining their complaints, but this was never done. Richards had made three or four calls to Cook. As far as the Company's complaints are concerned, they were what Richards claimed Cook had told them on the telephone, and what a girl had told him in her office. The complaint was not and could not be proved.

The language in the complaint concerning sexual harassment was solely that of Richards, and his alone. Respondent always maintained that he had done nothing wrong.

Copies of the memo went to the union steward, respondent, several superiors, and labor relations.

SUMMARY OF ARGUMENT

A. The tests for determining whether state law tort claims are preempted by Sec. 301 is whether a state court has to interpret a collective bargaining agreement in order to resolve the tort issue, and has been settled by Lingle v. Norge Division of Magic Chef, Inc., supra.

B. The petitioners have demonstrated no persuasive reasons for creating an exception to the Lingle rule in defamation cases.

C. Sec. 301 does not require an absolute privilege be granted to defamatory statements made in the course of grievance proceedings, and even if the Court should decide that an absolute privilege does exist, the qualified privilege articulated by Colorado law is virtually indistinguishable from the standard approved by the Supreme Court in a number of cases.

ARGUMENT

A. The tests for determining whether state law tort claims are preempted by Sec. 301 is whether a state court has to interpret a collective bargaining agreement in order to resolve the tort issue, and has been settled by Lingle v. Norge Division of Magic Chef, Inc., supra.

The view of the petitioners regarding an employee's right to be free from defamatory allusions within a labor relations context is hardly beneficent, and demonstrates a want of concern or understanding of interests so deeply rooted in local feelings and responsibility that in the absence of compelling congressional intention, it cannot be inferred that Congress has deprived the states of the power to act. San Diego Building Trades Council v. Garman, 359 U.S. 236 (1966). E.g. United Automobile Workers v. Russell, 356 U.S. 634 (1958). The harshness of the petitioners' views is aptly demonstrated in their interpretation of Hasten v. Phillips Petroleum Co., 640 F.2d 274 (10th Cir. 1981), when petitioners stated:

> The Hasten case requires judgment for the defendants even if the libelous statements were false, untrue, and malicious.
> (Emphasis supplied.)
> (Tr.Ct. Reply Br. p.4.)

This view would dismantle the law of defamation, be it state or federal.

Nevertheless, the Colorado Supreme Court rejected Hasten and similar cases and held that Lingle has settled the issue in favor of state law remedies as being independent of collective bargaining agreements when an interpretation of the agreement is not necessary

for the application of state law principles. In fact, the Colorado court adheres closely to Lingle, particularly when it stated that this case presented a stronger case for permitting state action than Lingle. The Colorado court said:

> Moreoever, this case presents a stronger case for permitting the state law action than Lingle. In Lingle the grievance proceeding and the wrongful discharge action decided, arguably, precisely the same issue: whether the termination of the employee was proper. In constrast, a grievance proceeding like the one involved in this case does not necessarily decide the truth of the matters asserted in a letter of discipline, but in many instances may focus narrowly on the appropriateness of the particular discipline imposed.
> (Pet. 12A)

There was no specific finding in this action as to the truth or falsity of the accusations made in the Company's notices of discipline. The Colorado court balked at the premise that a grievance is the sole remedy of an employee defamed by his employer. The restrictive grievance procedures would not remedy damage to his reputation and do not provide any mechanism for vindicating an employee's interest in protecting his good name from unjustified and knowingly false accusations of serious misconduct. The petitioners' views of an employee's good name, and his right to an opportunity to vindicate, are seriously deficient.

Many cases are cited in the petition to show a conflict in the circuits and the state courts which petitioners claim require intervention by the Court.

It is difficult to imagine a more clear-cut case than Lingle. The cases cited by petitioners such as Hasten and General Motors v.

Mandecki, 367 F.2d 66 (10th Cir. 1966), either predate Lingle, or as in Mandecki, for example, it is not clear whether the unqualified privilege was under state or federal law.

The state cases relied upon by the petitioners have no relevance here. The state courts have looked at the qualified privilege, the unqualified privilege, and no privilege at all principles in defamatory cases in different ways, which is how our system functions. But, the same courts will view torts, wrongful discharge, negligence, extreme and outrageous conduct, statutes of limitations, intrinsic fraud as opposed to extrinsic fraud, false imprisonment, police activities, warranties, statutes of fraud, res ipsa loquitur, common-law marriages, ad infinitum, in innumerable ways and with incalculable variance. There is no way this Court can track all of the state courts and try, in effect, to codify the law when a federal question is involved, nor does there appear to be any inclination on the part of the Court to have it otherwise.

Lingle has been followed by the Court in Clark v. Momence Packing Co., 486 U.S. 1049 (1988), where certiorari had been granted, the judgment vacated, and the case remanded in light of Lingle. In a retaliatory discharge case, the Court of Appeals for the Tenth Circuit also followed Lingle in Marshall v. TRW, Inc., Reda Pump Division, 900 F.2d 1517 (10th Cir. 1990).

The Lingle decision settles any conflicts which had arisen under 301 regarding independent state action by a practical and easily followed solution which clearly applies to the instant case.

B. The petitioners have demonstrated no persuasive reasons for creating an exception to the Lingle rule in defamation cases.

Although there is no Congressional legislation specifically governing defamatory actions predicated upon statements made during a labor grievance proceeding not prohibiting a state court from regulating conduct in a manner consistent with national labor policies, the petitioners constantly raise the spectre of national labor policy being frustrated by permitting state courts' independent action on state tort claims even if they clearly fall within the Lingle reasoning. The petitioners fail to grasp that a great measure of protection is afforded management in defamation claims arising during the course of labor proceedings if the qualified privilege only is applied. In Colorado, for instance, the qualified privilege is a formidable weapon in the defense of defamation claims, and most of the time is insurmountable. As held in Churchy v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988), it was held that in the face of a defendant's qualified privilege, a plaintiff can recover on the defamation claim only by showing that the defendant published the material with malice, that is, knowing the matter to be false, or acted in reckless disregard of its truth or falsity. Such a burden of proof will hardly disrupt the federal labor law policy.

Addressing the doomsday approach, the Supreme Judicial Court of Massachusetts in Ezekial v. Jones Motor Co., 372 N.E.2d 1281 (1978), said:

> While the defendants do not clearly argue that this slander action in the State court is preempted by Federal labor legislation, they do urge that they

> should be immune from liability to avoid frustrating the policies expressed in this Federal labor legislation. Protecting its residents from slander has long been a concern of the Commonwealth. A grant of the conditional privilege provides a sufficient safeguard against the dampening of free discussion of the pertinent facts important to the peaceful adjustment of grievances.
> (p. 1285)

C. Sec. 301 does not require an absolute privilege be granted to defamatory statements made in the course of grievance proceedings, and even if the Court should decide that an absolute privilege does exist, the qualified privilege articulated by Colorado law is virtually indistinguishable from the standard approved by the Supreme Court in a number of cases.

As the lower court noted, no United States Supreme Court decision has held that an unqualified privilege is required under the rubric of national labor policy. In fact, the lower court suggests that the existing Supreme Court precedent suggests that a qualified privilege is the standard. Indeed, one cannot find any clues in Sec. 301, nor any Supreme Court decisions that go beyond "malice" in any context.

If the Court holds that Sec. 301 preempts state defamation law, it will have to redefine the privilege in order that it becomes a more potent defense than that of malice in the landmark case of New York Times Co. v. Sullivan, 376 U.S. 257 (1964), where proving malice, although difficult, is a keystone of the case. The petitioners, at times, seem to view absolute or unqualified privilege as shielding the most horrifying and egregious of defamations -- falsity in its most perverse and indefensible form. In other words--

"anything goes." The cases in Colorado are virtually indistinguishable from the standard of malice in Letter Carriers, supra, and Linn, supra. See Churchy, supra, and Dominquez v. Babcock, 727 P.2d 362, 366 (Colo. 1986).

Finally, the Colorado court approved this definition in Restatement (Second) of Torts, comment, b, Sec. 600 (1977):

> [r]eckless disregard exists when there is a high degree of awareness of probable falsity or serious doubt as to the truth of the statement.

While the word malice is not used, it is implicit in this definition, and in the Colorado decisions.

The law regarding independent state claims within the Sec. 301 context was decided by Lingle and echoes the methodology of most courts deciding to follow Sullivan. The rules are strict, and national labor policy notwithstanding, shall not be made so strict so as to be not only preemptive, the law of defamation may disappear, unless the Court deems it necessary to carve out a wide exception with regard to defamation and labor law. This, we are assured it will not do.

The Lingle doctrine is fair, understandable, and easily applied. Its application to defamation cases is also fair, understandable, and easily applied, and protects state policies deeply imbedded in state law and broad local interests. Lingle should not be disturbed in this case.

CONCLUSION

For the reasons set forth above, the respondent herein submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the motion for leave to proceed in forma pauperis and affidavit in support thereof, and a copy of the brief in opposition, was deposited in the United States mail at the post office in Estes Park, Colorado, postage prepaid, first class, and addressed to the following:

David W. Kerber, Esq.
550 15th Street, Suite 900
Denver, Colorado 80202

on March 25, 1991.

Joseph D. Kendall